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IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

HON. HELEN CHENOWETH, HON. BOB SCHAFFER, HON. DON YOUNG, and HON. RICHARD W. POMBO, all in their official capacities,

Petitioners,

v.

WILLIAM J. CLINTON, President of the United States, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF AMICUS CURIAE OF HON. JOHN T. DOOLITTLE, HON. GEORGE RADANOVICH, HON. TOM TANCREDO, HON. BOB STUMP, HON. BARBARA CUBIN, HON. TOM A. COBURN, HON. WALLY HERGER, HON. JOHN E. PETERSON, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, GUN OWNERS FOUNDATION, CITIZENS UNITED FOUNDATION, AND CONCERNED WOMEN FOR AMERICA IN SUPPORT OF PETITIONERS

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

ALAN A. WOLL
6194 Highway 29 N.
Blevins, AR 71825

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070
Attorneys for Amici Curiae
**Counsel of Record*

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Bedard, Paul, "Washington Whispers," *U.S. News & World Report*, November 1, 1999, p. 13 5

Bennet, James, "True to Form, Clinton Shifts Energies Back to U.S. Focus," *New York Times*, July 5, 1998, section 1, p. 10 5

I Blackstone, Commentaries on the Laws of England 71 (1765) 12

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Shogren, Elizabeth, "Clinton to Bypass Congress in Blitz of Executive Orders," *Los Angeles Times*, p. A1, July 4, 1998 5

State of the Union Address, 33 Weekly Comp. Pres. Doc. 141 (February 4, 1997) 3

II Story, Commentaries on the Constitution (5th ed. 1891) 13, 14, 15

U.S. Congress, House Committee on Resources, April 29, 1997 Hearings "Establishment of the Grand Staircase-Escalante National Monument by President Clinton on September 18, 1996," p. 12 5

I Warren, The Supreme Court in United States History (1937) 14, 17

Weisman, Jonathan, "Clinton Finds Novel Ways to Enact Policies Without Congress' OK," *Baltimore Sun*, reprinted in *Dallas Morning News*, p. 8A, December 26, 1999 5

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INTEREST OF AMICI CURIAE

The individual *amici curiae*, Hon. John T. Doolittle (R-CA), Hon. George Radanovich (R-CA), Hon. Tom Tancredo (R-CO), Hon. Bob Stump (R-AZ), Hon. Barbara Cubin (R-WY), Hon. Tom A. Coburn (R-OK), Hon. Wally Herger (R-CA), and Hon. John E. Peterson (R-PA), are Members of the United States House of Representatives. These colleagues of the Petitioners support the Petitioners' efforts in this litigation to resist efforts by the Executive to circumvent the legislative process set forth in the Constitution.[1] The individual *amici* also have a direct interest in the issue involved, *i.e.*, whether Members of the House of Representatives have standing to contest in court

[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

executive directives usurping the legislative role of the House of Representatives.

The institutional *amici curiae*, Lincoln Institute for Research and Education ("LIRE"), Gun Owners Foundation ("GOF"), Citizens United Foundation ("CUF"), and Concerned Women for America ("CWA"), are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution of the United States. These *amici* were established in the District of Columbia (LIRE and CWA) and Virginia (GOF and CUF) for public education purposes related to the public policy process. Such purposes include programs to conduct research, and to inform and educate the public on important issues, including questions related to the correct interpretation of the U.S. Constitution. In the past, the institutional *amici* have conducted research on other issues involving constitutional interpretation, including the filing of *amicus curiae* briefs in other litigation involving constitutional issues, including cases before this Court.[2]

SUMMARY OF ARGUMENT

This question in this case is whether four Members of the House of Representatives have legal standing under Article III, Section 2 to challenge President Clinton's Executive Order establishing the American Heritage Rivers Initiative. Relying almost exclusively upon this Court's recent opinion in Raines v. Byrd, the courts below ruled that they did not. These rulings were erroneous.

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[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the various parties, have been submitted for filing to the Clerk of Court.

First, the courts below misapplied, not only the rule in Raines, but the rule in Coleman v. Miller. As for Coleman, the courts below incorrectly limited its reach to the specific facts of that case. As for Raines, the courts below erroneously applied a rule applicable only to **intralegislative** disputes ungoverned by any specific provision of the Constitution to an **interbranch** dispute governed by the procedural rules of Article I, Section 7 and Article II, Section 3 guaranteeing specific voting rights and other legislative prerogatives to members of Congress. Hence, the standing rule in Coleman, not Raines, applies. Second, the courts below ignored the Law of the Constitution, substituting the language of judicial opinions for the text of the Constitution. In doing so, they ignored Article III, Section 2, which provides that "the judicial power **shall** extend to **all** Cases ... in Equity arising under this Constitution" and Article I, Sections 1, 2, 4, and 7, which vest specific legal rights in individual members of Congress to participate in the law-making process prescribed by Article I, Section 7 and Article II, Section 3. Finally, the constitutional principle of separation of powers obliges this Court to grant the Petitioners standing. Otherwise, the liberties of the people guaranteed by the constitutional scheme dividing powers will be seriously eroded.

ARGUMENT

INTRODUCTION

In his February 1997 State of the Union address, President William Clinton announced his intention to create an American Heritage Rivers Initiative ("AHRI"), whereby he would designate selected rivers as "Heritage Rivers" to "help communities alongside them revitalize their waterfronts and clean up pollution." 33 Weekly Comp. Pres. Doc. 141 (Feb. 4, 1997). Thereafter, the President directed several executive agencies to implement the initiative, establishing an American

Heritage Rivers Interagency Committee which, in turn, conducted an investigation, including public hearings, and provided the President with policy recommendations and proposed rules.

In response, on September 11, 1997, President Clinton issued Executive Order 13061, 62 Fed. Reg. 48445 (1997) establishing AHRI. Executive Order 13061 initiated a new federal regulatory policy designed "to protect and restore rivers and their adjacent communities," which authorized the President to "designate rivers that meet certain criteria as 'American Heritage Rivers'" and to direct "executive agencies ... to the extent permitted by law [to] coordinate Federal plans, functions, programs, and resources to preserve, protect, and restore rivers and their associated resources important to our history, culture, and natural heritage." Chenoweth v. Clinton, 997 F. Supp. 36, 39 (D.D.C. 1998).

In this Executive Order, President Clinton acted in a manner comparable to President Harry Truman's seizure of the nation's steel mills, which bypassed Congress, and took control of the steel mills pursuant to "a presidential policy ... in a manner prescribed by the President." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952).

Refusing to wait for Congress to act, President Clinton — within the executive branch of government — replicated the process that Congress typically engages in before it passes a bill onto the President. He created a committee, composed of members of the executive branch, and directed it to conduct an investigation, which included public hearings. This committee then submitted recommendations of policy and rules, forming

the basis of Executive Order 13061, which enjoys the force of law without any Congressional participation.[3]

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[3] President Clinton's action regarding the American Heritage Rivers Initiative is not an isolated event, but rather part of a protracted assault on the legislative powers given Congress under Article I. President Clinton and his advisors have been both consistent and outspoken in their disregard for the limitations imposed on the executive branch by the Constitution. As Senator Orrin Hatch (R-UT), Chairman of the Senate Judiciary Committee, has observed, "[t]his President has a propensity to bypass Congress and the States and rule by executive order; in other words, by fiat." U.S. Congress, House Committee on Resources, April 29, 1997 Hearings, "Establishment of the Grand Staircase-Escalante National Monument by President Clinton on September 18, 1996," p. 12.

In 1998, the *Los Angeles Times* reported on "a blitz of executive orders during the next few weeks, part of a White House strategy to make progress on Clinton's domestic agenda with or without congressional help." Elizabeth Shogren, "Clinton to Bypass Congress in Blitz of Executive Orders," *Los Angeles Times*, p. A1, July 4, 1998. White House spokesman Jake Siewart stated that "[w]e've been fairly unapologetic about finding ways to act where we've found that Congress hasn't acted." Jonathan Weisman, "Clinton Finds Novel Ways to Enact Policies Without Congress' OK," *Baltimore Sun*, reprinted in *Dallas Morning News*, p. 8A, December 26, 1999. Perhaps no one has put his admiration for the raw power implicit in the Clinton doctrine of executive orders more succinctly than Clinton advisor Paul Begala: "Stroke of the Pen. Law of the Land. Kinda Cool." James Bennet, "True to Form, Clinton Shifts Energies Back to U.S. Focus," *New York Times*, July 5, 1998, section 1, p. 10. White House Chief of Staff John Podesta developed "Project Podesta," a program to bypass Congress using executive orders and changes to federal rules. Paul Bedard, "Washington Whispers," *U.S. News & World Report*, Nov. 1, 1999, p. 13.

The courts have not totally disregarded President Clinton's assault on Congress' legislative authority. *See* Chamber of Commerce of the U.S. v. Reich, 74 F.3d 1322 (D.C. Cir. 1996), invalidating a presidential Executive Order (No. 12954), for only the second time in U.S. history. A more extended treatment of this subject can be found at William J. Olson and Alan Woll, "Executive Orders and National Emergencies: How Presidents Have Come to 'Run the Country' by Usurping Legislative Power," *Policy Analysis*, No. 358, October 28, 1999, published by the CATO Institute, www.cato.org/pubs/pas/pa-358es.html.

In this case, four Members of the House of Representatives assert that the President has, by action comparable to that in Youngstown, seized from them their constitutionally-guaranteed right to vote, as well as other legislative prerogatives that are rightfully theirs as members of the House Resources Committee. This is not a "generalized grievance" which they suffered in common with the American people. Rather, it is a "personal, particularized, and concrete injury." The Petitioners have been "completely" deprived of their right to vote on whether to **initiate** legislation regarding America's rivers, a power explicitly granted to them, and denied to the President, by Article I, Section 7, and Article II, Section 3 of the U.S. Constitution.

At issue in this case is whether Petitioners' constitutionally-guaranteed rights are "personal, particularized, concrete, and otherwise judicially cognizable." Relying primarily upon this Court's decisions in Raines v. Byrd, 521 U.S. 811 (1997) and Coleman v. Miller, 307 U.S. 433 (1939), the courts below ruled that Petitioners did not meet this standard.

Not only did those courts misapply both the holdings and rules of Raines and Coleman, they misapplied the express terms of Article III, Section 2 of the Constitution, which mandates that "[t]he Judicial Power **shall** extend to **all** Cases, in Law and Equity, arising under this Constitution...." (Emphasis added.)

I. THE COURTS BELOW DECIDED THE STANDING QUESTION IN CONFLICT WITH COLEMAN V. MILLER AND RAINES V. BYRD.

A. The Courts Below Misapplied Coleman v. Miller.

According to the Court of Appeals below, the Petitioners lacked legal standing because "the Representatives do not

allege that the necessary majorities in the Congress voted to block the AHRI [and], therefore they cannot claim their votes were effectively nullified by the machinations of the Executive." Chenoweth v. Clinton, 181 F.3d at 116 (D.C. Cir. 1999). This ruling, in turn, reflected the Court of Appeals' view that Raines v. Byrd narrowed the **rule**, announced in Coleman v. Miller, that only "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue...." *Id.*

This is **not** the **rule** of Coleman, but its **holding**. As explained in Raines, Coleman **held** that the legislators in that case had clearly satisfied the legal **rule** "that their votes have been completely nullified," because they had shown that, as a matter of fact, their "votes would have been sufficient to defeat (or enact) a specific legislative Act...." Raines v. Byrd, *supra*, 521 U.S. at 823.

In Raines, this Court did not limit the application of Coleman to its particular facts. After concluding that the plaintiffs' claim in Coleman and Raines were not on the same factual footing, this Court continued its analysis whether the Raines plaintiff had demonstrated a "level of vote nullification" sufficient to support a claim of "a plain, direct, and adequate interest in maintaining the effectiveness of their votes" as required by Coleman. Only after deciding that the plaintiffs in Raines complained of an "abstract dilution of institutional legislative power" did this Court conclude that they did not have standing. Raines, *supra*, 521 U.S. at 826.

The Coleman rule, then, does not require proof that Petitioners' votes would have been sufficient to defeat (or enact) a specific legislative Act, as the Court of Appeals below held. Rather, Petitioners only need demonstrate that their constitutionally-guaranteed vote as Members of the House of

Representatives has been so "nullified" as to create a "plain, direct, and adequate interest in maintaining the effectiveness of their votes." Petitioners have met this standard.

B. The Rule of Coleman v. Miller Has Been Met.

Article I, Section 7 sets forth the specific process by which an act "becomes a law," and details the respective roles to be played by the House, the Senate, and the President. Although Article II, Section 3 permits the President to take an initiative role in the law-making process, it expressly limits that role to "recommending to their [Congress's] Consideration such Measures as he shall judge necessary or expedient...." *See* Clinton v. New York, 524 U.S. 417, 438 (1998). Under Article I, Section 7, it is for Congress to decide whether to take a presidentially-recommended "Measure" and translate it into a "Bill...Order, Resolution or Vote," a constitutional prerequisite before such a "Measure" can ever become a law. If Congress takes such action, then Article I, Section 7 limits the role of the President to approve or disapprove the "Measure" initiated by Congress. If Congress takes no action, the President may not act, no matter how "necessary and expedient" he thinks that his recommended "Measure" may be. *Id.*, 542 U.S. at 448-49.

As this Court has rightfully observed, this "prescription for legislative action in Article I, [Section] 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." I.N.S. v. Chadha, 462 U.S. 919, 951 (1983). By initiating the AHRI, without any participation whatsoever by Congress, President Clinton has turned this "single, finely wrought and exhaustively considered, procedure" upside down. Instead of limiting his action to a recommendation to Congress for its "Consideration," as prescribed by Article II, Section 3, the

President has acted unilaterally. Instead of waiting for Congress to take the **initiative** to draft and approve a "Bill" or "Order," as prescribed by Article I, Section 7, the President has supplanted Congress by promulgating Executive Order 13061. Instead of the President responding to a Congressional Bill or Order with his signature or his veto, the President has forced the Congress to respond to his initiative. In so acting, the President has "completely nullified" the vote of every member of Congress, as guaranteed by Article I, Section 7.

Further, the President substituted a presidentially-appointed and constituted Interagency Committee on American Heritage Rivers to "Consider" his proposed "Measure" in the place of the Resources Committee of the House of Representatives which had been duly constituted by the Speaker of the House and to which the Petitioners had been appointed. Thus, instead of a Congressional Committee initiating and conducting the appropriate investigation, holding public hearings, and making the necessary policy recommendations for an AHRI or some variation of it, the President bypassed the entire process. By ignoring the command of Article II, Section 3, the President "completely nullified" the Committee votes of the four petitioning House Members, all of whom serve on the House Resources Committee (which has jurisdiction of the AHRI's subject matter), denying to them their constitutionally-guaranteed right to "Consider" whatever "Measures" the President "shall judge necessary and expedient."

Despite the President's action, completely nullifying the voting rights and other legislative prerogatives vested by the Constitution in the House, including the Petitioners, the courts below ruled that the Petitioners lacked standing. In explanation of their rulings, the district judge observed that, "legislative remedies were still available to them," 997 F. Supp. at 39, while the Court of Appeals wrote that, "[i]t is uncontested that

the Congress could terminate the AHRI were a sufficient number in each House so inclined." 181 F.3d at 116. But a vote to terminate an action unilaterally taken by the President is not the same vote as one concerning whether to take action in the first place. Nor is "consideration" of a measure, **after** that measure has been given the force of law, the same as consideration of that same measure **before** it became law.

C. Raines v. Byrd Does Not Apply Here.

The courts below claimed that Raines v. Byrd, *supra*, dictated their rulings that a vote to repeal is the constitutional equivalent to a vote to initiate. That is not correct.

In Raines, no member of Congress was denied his constitutionally-guaranteed right to vote on the Line Item Veto Act **before** it became a law. The Act began as a Bill in Congress, not as an Executive Order in the White House. Thus, it was Congress, not the President, which took the initial legislative action to diminish its own powers. 521 U.S. at 813. That is why this Court concluded in Raines that the complaining Senators' and Representatives' "votes were given full effect. They simply lost that vote." *Id.*, at 824.

But the Petitioners here were not on the losing side of a vote in Congress. By issuing Executive Order 13061, the President bypassed Congress completely. Unlike Raines, then, this is not a "mere intra-parliamentary controversy." 307 U.S. at 441.

Indeed, the dispute here is not even arguably an intra-legislative controversy, as was the case in Coleman. Unlike the Lieutenant Governor in Coleman, the President does not have a "vote" in either house of Congress. By the terms of Article II, Section 3 of the Constitution, the President only has a right to recommend a legislative measure **before** a vote and, by the

terms of Article I, Section 7, he only has the right to approve or disapprove a legislative bill or other action **after** a vote. He cannot intrude into the legislative process any other way. If he does, he certainly usurps the rights of individual Members of Congress such as Petitioners who, in turn, have legal standing to vindicate "an institutional injury," because each one has "a plain, direct and adequate interest in maintaining the effectiveness of their votes." Coleman v. Miller, *supra,* 307 U.S. at 438.

D. The People's Representatives, Like the People, Have Standing to Protect Their Right to Vote.

Should this Court turn its back on the rule in Coleman, then, it would have to reject not only the "controlling authorities" of Hawke v. Smith, 253 U.S. 221 (1920), and Leser v. Garnett, 258 U.S. 130 (1922) (as Chief Justice Hughes pointed out in Coleman, 307 U.S. at 438-41), but also a long line of cases from Colegrove v. Green, 328 U.S. 549 (1946) to Baker v. Carr, 369 U.S. 186, 206-08 (1962). For nearly 80 years this Court has held that a "citizen and elector" has standing to assert a claim that his right to vote has been unconstitutionally impaired. Contrary to the assertions of the courts below, legal standing of the people's representative, like that of the citizen/elector, does not require a claim of diminished voting power in relation to a specific piece of legislation. *See* Raines v. Byrd, *supra,* 521 U.S. at 837 (Stevens, J., dissenting).

For standing, it is enough that the complaint is rooted in the denial of specific constitutional procedural guarantees vesting a right to vote in the people's elected representatives as Members of Congress.

II. THE COURTS BELOW DECIDED THE STANDING QUESTION IN CONFLICT WITH ARTICLE III, SECTION 2 OF THE CONSTITUTION.

A. The Law of the Constitution Governs.

The real issue in this case is whether the Petitioners have legal standing under the Law of the Constitution. Yet the Court of Appeals below never even mentioned the applicable constitutional text, much less analyzed it. Although the district court referred to the text once, it explained its decision solely on the basis of this Court's and the Court of Appeals' precedent without any analysis of the relevant constitutional text.

Although this Court's opinions, as well as the opinions of other courts, "are held in the highest regard," they should not be mistaken as the Law of the Constitution. Rather, as Sir William Blackstone stated so well, "**the law**, and the **opinion of the judge** are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may **mistake** the law." I Blackstone, Commentaries on the Laws of England 71 (1765) (emphasis original.)

This rule — that the law and court opinions are not interchangeable terms — was well understood and applied in the first case in which this Court ruled an Act of Congress unconstitutional. In Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803), Chief Justice John Marshall wrote that "a law repugnant to the constitution is void; and that **courts**, as well as other departments, are **bound** by that **instrument**." (Emphasis added.) This followed, the Chief Justice reasoned, not only from the very nature of a written constitution, but from the language of Article VI, which states that "this Constitution ... shall be the Supreme Law of the Land ... and [t]he Senators and Representatives ... and all executive and judicial Officers, shall

be bound by Oath or Affirmation, to support this Constitution...." Had the courts below examined the relevant constitutional text, they would have ruled that the Law of the Constitution confirms that the Petitioners have standing.

B. The Text of Article III, Section 2 Defines a "Case."

According to Article III, Section 2, "[t]he judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution...." The constitutional document, itself, does not define the key term, "Case," but does provide the precise source from which to glean such a definition. To qualify as a "Case," a matter in dispute must be the kind of contest traditionally recognized by courts of "Law" or "Equity" in existence in the several states at the time the Constitution was written. *See, e.g,* The Federalist No. 80; Madison, Notes of Debates in the Federal Convention of 1787 539 (Norton: 1987) (hereinafter Madison's Notes.) This choice was deliberate, the Framers having specifically rejected a proposal that the judiciary have an active general "revisory power over the actions of Congress." Muskrat v. United States, 219 U.S. 346, 361 (1911); Madison's Notes, *supra,* at 32, 461-65.

At the same time, the Framers agreed to extend the jurisdiction of courts to "Cases ... arising under this Constitution," contests that, in 1787, were not traditionally within the jurisdiction of the English common law and equity courts. II Story, Commentaries on the Constitution Sections 1645-46 (5th ed. 1891) (hereinafter Story's Commentaries). This decision also was deliberate, endorsed over the vigorous objections of several delegates. Madison's Notes, *supra,* at 462-65. By limiting the jurisdiction to cases as they were defined at law and in equity, however, these objections were overcome (Madison's Notes at 393, 538-39), and the federal

courts soon began adjudicating cases involving questions of application of the Constitution. I Warren, The Supreme Court in United States History 62-84 (1937); II Story's Commentaries, *supra,* at Section 1647.

By the express terms of Article III, Section 2, the Framers contemplated that the Constitution would be a new source of rights which, in turn, would expand the jurisdiction of the federal courts beyond that enjoyed by the common law and equity courts. At the same time, by that section's express terms, the Framers contemplated that the judicial power extended only to those rights created by the Constitution that were "legal" in nature. As Justice Felix Frankfurter observed in Coleman v. Miller, *supra,* 307 U.S. at 460, the jurisdiction of the courts extended to "legal" issues, not "political"ones, only the former being "the staple of judicial business."

C. The Constitution Vests a Legal Right in Petitioners.

In Marbury v. Madison, *supra*, Chief Justice Marshall addressed both of these issues, looking to the statutory and constitutional texts, first, to discover the rules by which appointments to federal office are governed and, second, to determine whether a claim to a disputed appointment before it was a matter of obligation or discretion. The Court decided that the applicable statutory and constitutional provisions established that an appointment to the federal office in question occurred at the time that the President's seal was placed on the appointment papers, the President only having the power of appointment. Having held that the act of delivery of the appointment papers was only a "ministerial" act, and that the nature of the office to which the person had been appointed was judicial, this Court concluded that the appointee had a "vested legal right" in the appointment, obligatory upon the President.

The same principle applied in Marbury also applies here. The Petitioners' claim is rooted in Article I, Section 7 and Article II, Section 3, both of which govern the President's participation in the legislative process. *See* Clinton v. New York, *supra*, 524 U.S. at 429-30, 438-39. Under Article I, Section 7, only Congress has the power to conduct the formal legislative process by which a proposal may become a law, with the President playing only a responsive role triggered by Congress presenting a legislative measure, previously agreed to by each House, for the President's approval or disapproval. This "finely wrought" procedure demands, as this Court has consistently ruled, that no measure can become a federal law unless it is a "product" of the process spelled out in Article I, Section 7. *Id.*, 524 U.S. at 439-40; Chadha, *supra*, 462 U.S. at 951.

Article II, Section 3 reinforces this reading of Article I, Section 7. As Joseph Story observed, Article II, Section 3 "require[s] the President to lay **before Congress** all facts and information which may assist **their deliberations**; and in enabling him at once to **point out** the evil and to **suggest** a remedy." II Story, Commentaries on the Constitution, *supra*, Section 1561 (emphasis added).

Because the Constitution establishes that the President has absolutely no authority "to enact, to amend, or to repeal statutes" (Clinton v. New York, *supra*, 524 U.S. at 414), and further that this authority rests with Congress, the question is whether the Constitution further provides the Petitioners, all duly elected Members of the House of Representatives, "vested legal rights" to participate in the formal legislative process set forth in the Constitution. The answer is yes.

Article I, Section 1 of the Constitution "vest[s] ... [a]ll legislative Powers herein granted in a Congress of the United

States, which shall consist of a Senate and House of Representatives." Article I, Section 2 states that the "House of Representatives shall be composed of Members chosen by the People of the several States...." Article I, Section 5 provides that the "House shall be the Judge of the Elections, Returns and Qualifications of its own Members...." Thus, once a person is elected to the House of Representatives, and recognized as having been so elected, that person is "vested" with all the legislative prerogatives conferred upon him by the Constitution and the rules of the House, insofar as those rules are consistent with the commands of the Constitution. *See* Powell v. McCormack, 395 U.S. 486 (1969).

Indeed, if a justice of the peace appointed by the President has a "vested legal right" to the prerogatives of a judicial office created by statute, as this Court held in Marbury v. Madison, *supra*, then surely a Member of the House of Representatives, elected by the people and judged qualified to serve, has a "vested legal right" to the prerogatives of a legislative office created by the Constitution. Thus, as there was a "case in equity" within the meaning of Article III, Section 2 in Marbury v. Madison, *supra*, so there is a "case in equity" here.

D. Petitioners' Claim is a "Case...in Equity": Personal, Particularized, and Concrete.

Both courts below dismissed plaintiffs' standing on the grounds that their injury was not a "personal, particularized, concrete" one, but an "institutional injury" suffered by all members of the House equally, and therefore, nonjusticiable. These rulings mistake not only the nature of the injury suffered by each plaintiff, but the principles governing the requirement that a case, within the meaning of Article III, Section 2, must not be a grievance shared in common by people generally.

As Justice Frankfurter noted in Coleman v. Miller, *supra*, the parties who seek adjudication of a dispute in a federal court must be real "adversaries" presenting "a concrete, living contest," not an "abstract, intellectual problem" or an otherwise "undifferentiated [issue of] general interest" common to the general public. 307 U.S. at 460. This view of the reach of judicial power is supported not only by the text of Article III, Section 2, but by its historical context as well.

Unquestionably, a "case in law or equity" must meet the common law requirement that two or more adversarial parties are before the court seeking an authoritative resolution of a real, concrete, and personal controversy, not an advisory opinion subject to revision by either the executive or the legislative branches. This has been the Court's view since the founding of the American republic. *See, e.g.*, I Warren The Supreme Court in United States History 108-111 (1937); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); Muskrat v. United States, *supra*, 219 U.S. at 346.

Because of this textual and historical understanding, this Court has guarded against entry into intra-legislative disputes, recognizing not only that the Constitution does not authorize this Court to exercise "'some amorphous general supervision of the operations of government'" (Raines v. Byrd, *supra*, 521 U.S. at 829), but also that an individual member of the legislative branch embroiled in an intra-legislative dispute is not acting in his individual capacity, "but as [a] political representative [of the people] executing the legislative process." Thus, the legislator has no better standing to challenge the constitutionality of a measure duly enacted by a majority of his colleagues than a citizen and taxpayer that he represents. *See* Frothingham v. Mellon, 262 U.S. 447 (1923).

This case, however, presents no contest between Petitioners and their fellow legislators. Rather, it presents an **interbranch** dispute between Petitioners and the President that is governed by precise rules of procedure laid down in the constitutional text. Unlike other interbranch disputes, such as Goldwater v. Carter, 444 U.S. 996 (1979), this is not a dispute that the Constitution has left to be resolved politically, but one that this Court has acknowledged to be governed by precise rules of procedure unrevisable by either of the two branches. *See* Chadha, *supra*, and Clinton v. New York, *supra*.

E. "Prudential" Concerns Have No Place Here.

In Raines v. Byrd, *supra*, a majority of this Court expressed concern that, if it entertained law suits between members of the executive and judicial branches, it may be "improperly and unnecessarily plunged into ... bitter political battle[s] waged between the President and Congress." Thus, it worried that, if pressed into service to adjudicate such disputes, it might risk the "'public esteem for the federal courts and ... the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.'" *Id.*, 521 U.S. at 827-29. Such prudential concerns have no place in determining whether Petitioners have standing. First, the text of Article III, Section 2 contains a precise command, leaving no such prudential discretion to the courts: "The judicial Power **shall** extend to **all** Cases, in Law and Equity, arising under this Constitution...." (Emphasis added.) If a contest — even one between individual legislators and the President — qualifies as a "case" within the meaning of this provision, the courts **must** take jurisdiction. Second, the very nature of judicial power belies the claim that the courts have discretion to deny standing, notwithstanding their constitutional obligations. As Chief Justice John Marshall observed in Osborn v. The Bank

of the United States, 22 U.S. (9 Wheat) 738, 866 (1824): "[j]udicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing.... Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect ... to the will of the law."

III. VINDICATION OF THE EXCLUSIVE LEGISLATIVE ROLE OF CONGRESS IS THE DUTY AND OBLIGATION OF THIS COURT.

The legislative, executive and judicial functions of the national government have been separated for the purpose of better securing liberty. Bowsher v. Synar, 478 U.S. 714, 721-22 (1986). Violations of the constitutional structure of government have a far-reaching effect. As Justice Kennedy has recently observed, "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." Clinton v. New York, *supra*, 524 U.S. at 450 (1998) (Kennedy, J., concurring). Such a transgression has clearly been raised by this case, where the President has usurped the lawmaking function.

This Court has observed that the constitutional separation of powers works to "assure full, vigorous, and open debate on the great issues affecting the people." Bowsher, *supra*, 478 U.S. at 722. It ensures "that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials." Chadha, *supra*, 462 U.S. at 943. However, such debate and careful consideration do not occur when the President has acted unilaterally as a lawmaker.

The duty of vindicating the constitutional separation of powers from transgressions by the individual branches of government rests firmly with the judicial branch. "Many

decisions of this Court ... have unequivocally reaffirmed the holding of Marbury v. Madison, 1 Cranch 137 (1803), that '[it] is emphatically the province and duty of the judicial department to say what the law is.' *Id.*, at 177." United States v. Nixon, 418 U.S. 683, 703 (1974) (brackets in quotation). This duty cannot be evaded by this Court. "Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications.... Marbury v. Madison, 1 Cranch 137 (1803), was also a 'political' case, involving as it did claims under a judicial commission alleged to have been duly signed by the President but not delivered. But 'courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.' Baker v. Carr, [390 U.S.,] at 217." [Chadha, 462 U.S. at 942-43 (1983).]

CONCLUSION

For the reasons set forth above, we respectfully urge this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

Herbert W. Titus
Troy A. Titus, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

Alan A. Woll
6194 Highway 29 N.
Blevins, AR 71825

William J. Olson*
John S. Miles
William J. Olson, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

Attorneys for Amici Curiae
**Counsel of Record*

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